88-736

NO. _____

Supreme Court, U.S.
FILED
OCT 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EVELYN WANKOFF,
ADMINISTRATRIX OF THE ESTATE
OF IRVIN WANKOFF, DECEASED, AND
EVELYN WANKOFF IN HER OWN RIGHT,

Petitioner,

VS.

THOMAS TIBBS AND CONSOLIDATED
FREIGHTWAYS CORPORATION
AND
THOMAS JEFFERSON UNIVERSITY
HOSPITAL, ADDITIONAL DEFENDANT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, EASTERN DISTRICT

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QUESTIONS PRESENTED

1. May the Commonwealth of Pennsylvania, by action/inaction of its courts, deny a party of his/her day in court on the merits, by rendering and affirming a judgment of non pros based upon misapplication of law and repealed rules of court; all of which was in the absence of a hearing and without required notice?

2. Did the Commonwealth of Pennsylvania by action of its Prothonotary (Clerk of the Court) violate Petitioner's Constitutional guarantee by the unauthorized rejection of a timely filed procedural certificate?

PARTIES

The caption of this petition contains the names of all parties to this proceeding.

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PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF PENNSYLVANIA,
EASTERN DISTRICT

Petitioner, Evelyn Wankoff, as Administratrix of the Estate of Irvin Wankoff and in her own right respectfully prays that a Writ of Certiorari issue to review the judgment and order of the Supreme Court of Pennsylvania entered in this proceeding on July 25, 1988.

JURISDICTION

The Supreme Court of Pennsylvania rejected Petitioner's Application for Reconsideration on July 25, 1988. Thus the jurisidiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND REGULATIONS

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

> or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pennsylvania Bulletin Docket No. 79-1724:
See appendix (A-19-23).

General Court Regulation 83-4:
See appendix (A-35).

Pennsylvania Bulletin Docket No. 81-427:
See appendix (A-34).

Philadelphia Civil Rule 40(B):
See appendix (A-39-43).

Philadelphia Civil Rule 130:
See appendix (A-36-38).

Philadelphia Civil Rule 151:
See appendix (A-24-33).

Star Rule *350:
See appendix (A-36-38).

STATEMENT OF THE CASE

On June 12, 1978, in the City and County of Philadelphia, Irvin Wankoff suffered severe personal injuries when he was struck by a tractor-trailer, driven by Thomas Tibbs (hereinafter Tibbs) on behalf of his employer, Consolidated Freightways Corporation (hereinafter Consolidated), which was backing up the wrong way on a one-way street. A

security guard from Thomas Jefferson University Hospital (hereinafter the University) was directing the truck when it struck Mr. Wankoff.

Mr. Wankoff suffered severe personal injuries, including: a blow to his head, from the rear portion of the tractor-trailer; crush injuries to his left leg, left foot and left arm with a fractured left ankle, which was a result of the tractor-trailer tires backing up over his body; fractures to the lower ribs; and numerous contusions and hematomas. These severe injuries necessitated that Mr. Wankoff be hospitalized on two separate occasions and undergo surgery and debridement of wounds with multiple sheets of skin grafting harvested and applied to the wounds on his left arm, left foot and left leg.

On October 31, 1979, an action in trespass was commenced by Irvin Wankoff and his wife, Evelyn Wankoff (hereinafter Plaintiffs). The activity which thereafter took place in this litigation was as follows:

October 31, 1979	Plaintiffs filed Complaint in Trespass against Defendants, Tibbs and Consolidated.
November 5, 1979	Plaintiffs' Complaint served on Defendant, Consolidated.
November 7, 1979	Plaintiffs' Complaint served on Defendant, Tibbs.
November 21, 1979	Charles J. Bogdanoff, Esquire, filed an Entry of Appearance on behalf of both Defendants.
	Demand for Jury Trial entered by Defendants.
January 4, 1980	Defendants filed answers to Plaintiffs' Interrogatories.
February 25, 1980	Depositions of William Cox (the University security guard).
March 15, 1980	Defendants filed petition for leave to join Additional Defendant, the University.
March 20, 1980	Deposition of Lorna Shurkin and Jean Gray (eyewitnesses to accident).
April 8, 1980	Order of Judge Greenberg granting Defendants twenty (20) days within which to join University as an

	Additional Defendant without prejudice to the rights of the University to object to said joinder.
May 1, 1980	Defendants filed Complaint against Additional Defendant, the University.
May 2, 1980	Defendants' Complaint served on Additional Defendant, the University.
May 7, 1980	Entry of Appearance filed by A. Grant Sprecher, Esquire on behalf of Additional Defendant, the University.
May 28, 1980	Defendants' Interrogatories to Plaintiff and answers filed.
July 21, 1980	Deposition of Plaintiff, Irvin Wankoff.
August 7, 1980	Deposition of Defendant, Tibbs.
August 15, 1980	Preliminary Objections of Additional Defendant, the University, to Defendants' Complaint. These Preliminary Objections were filed more than fifty days late.
August 18, 1980	Certificate of Readiness filed by

	Plaintiffs, in accord with the "240 Day Rule" and Rule 151 of the Philadelphia Rules of the Court. (See pgs. 6-7, infra.) (A-44)
August 20, 1980	Certificate of Readiness erroneously returned by Prothonotary's office. (A-45)
	Pursuant to the Prothonotary's instruction, application for extension of time to certify action for trial filed.
September 5, 1980	Deposition of Defendant, Tibbs, filed.
September 26, 1980	Preliminary Objections of Plaintiffs to Preliminary Objections of Additional Defendant filed.
	Preliminary Objections of Defendants to Preliminary Objections of Additional Defendant filed.
October 1, 1980	Petition for Extension of Time to file Certificate of Readiness granted. Time extended to December 31, 1980. (A-18)
October 6, 1980	Amended Preliminary

	Objections of Additional Defendant filed.
October 16, 1980	Preliminary Objections of Defendants, Tibbs and Consolidated, to Additional Defendant's Amended Preliminary Objections, filed.
	Preliminary Objections of Plaintiffs, to Additional Defendant's amended Preliminary Objections, filed.
November 3, 1980	Reply of Additional Defendant, the University, to Preliminary Objections of Defendants, Tibbs and Consolidated, filed.
	Reply of Additional Defendant, the University, to Preliminary Objections of Plaintiffs, filed.
December 11, 1980	Preliminary Objections and Amended Preliminary Objections of Additional Defendant are overruled.
	Preliminary Objections of Plaintiffs and Defendants to the Preliminary Objections and Amended Preliminary Objections of Additional Defendant are sustained.

January 6, 1981	Plaintiffs' attorney received phone call from Defendant, Consolidated, regarding settlement negotiations.
February 4, 1981	Additional Defendant's, Answer to Defendants Complaint and Additional Defendant's Cross-Claim against Defendants, Tibbs and Consolidated, filed.
February 11, 1981	Answer of Defendants, Tibbs and Consolidated, to the Cross-Claim of the Additional Defendant, the University, filed.
April 12, 1981	Deposition of Annie D'Oliveira (eyewitness to accident).
April 23, 1981	Plaintiffs' attorney spoke with Additional Defendant's attorney regarding settlement negotiations.
July 9, 1981	Additional Defendant's first set of interrogatories to Defendant, Consolidated and Answers filed.
July 28, 1982	Plaintiff received notice from Additional Defendant of deposition of insurance companies to be taken.

August 11, 1982	Deposition of Custodian of Records-CNA Insurance Company.
September 27, 1982	Deposition of Custodian of Records-Geico Insurance Company.
March 25, 1983	Plaintiff, Irvin Wankoff, died.
February 7, 1986	Suggestion of Death filed and Evelyn Wankoff, Executrix of estate, substituted as Plaintiff for Irvin Wankoff.

Approximately one month after the commencement of this suit, on November 19, 1979, the Supreme Court of Pennsylvania promulgated the "240 Day Rule" which required all actions commenced prior to December 31, 1979 to be certified for trial by August 31, 1980 and required all actions commenced on or after January 1, 1980 to be certified within 240 days of the date of commencement. See 9 Pa. Bull. 3936. (A-19-23). The purpose of this rule was to alleviate the backlog of cases congesting the Pennsylvania State Courts

which created trial waiting periods of five years from completion of discovery for major jury cases. The "240 Day Rule" was subsequently vacated by order of the Pennsylvania Supreme Court on March 6, 1981. See 11 Pa. Bull. 1015. (A-34).

By order of the Board of Judges of the Court of Common Pleas of Philadelphia County, Philadelphia Civil Rule 151 (hereinafter Rule 151), modeled after the "240 Day Rule", became effective July 1, 1980. See General Ct. Reg-80-7. (A-24-33). Rule 151 (A)(9)(a) provided that an action commenced on or before December 31, 1979 was subject to dismissal by the Court where a Certificate of Readiness or a petition for extension was not filed by August 31, 1980. Subsequently, Rule 151 was rescinded in full by the Board of Judges on November 17, 1983. See Gen. Ct. Reg. 83-4. (A-35).

On or about August 18, 1980, in full compliance with the "240 Day Rule" and Rule 151, Mr. Wankoff's counsel timely filed a

Certificate of Readiness with the Prothonotary (Clerk of the Court) of Philadelphia County. (A-44). The Certificate of Readiness was erroneously returned by the Prothonotary with a note explaining that it was being returned because of outstanding Preliminary Objections. (A-45). Immediately thereafter, Plaintiff's counsel, pursuant to instructions from the Prothonotary, filed a timely application for extension to certify the action for trial. The time for filing a Certificate of Readiness was extended by the Court to December 31, 1980. (A-18).

Plaintiffs were informed by the Prothonotary that Preliminary Objections to the original Defendants' cross-complaint had been filed by the Additional Defendant, the University. Thereafter, a series of Preliminary Objections and Amended Preliminary Objections were filed by all parties. Finally, the Motion Court ruled in Plaintiff's favor.

Plaintiffs' counsel and counsel for the

Defendants' completed discovery in late September of 1982, and began the long wait for trial, which was commonplace in the Philadelphia venue during that period. At various times thereafter, Plaintiffs' counsel made inquiries to the Office of Civil Listings regarding an approximate trial date. Mr. Wankoff died in 1983 and Mrs. Wankoff was substituted in his behalf. In early June of 1986, Plaintiff's counsel was informed for the first time by the Office of Civil Listings that it had no record of the filing of a Certificate of Readiness and that it was for such reason that the case was not listed for trial. (A-46 and A-47-48).

Plaintiff's counsel immediately sought to refile the Certificate of Readiness. The Prothonotary's Office informed Plaintiff's counsel that leave of court would first be necessary before the Certificate of Readiness could be refiled, and that there would be "no problem"; a petition to file nunc pro tunc was the accepted procedure. Thereupon,

Plaintiff's counsel promptly filed a petition for leave to file a Certificate of Readiness nunc pro tunc. Plaintiff requested that the Court of Common Pleas of Philadelphia County (hereinafter the lower court) allow the case to go to trial in order to allow Plaintiff to have her day in Court. Judge Alfred J. DiBona, Jr. denied Plaintiff's petition stating that she never filed nor attempted (emphasis supplied) to file a Certificate of Readiness in accord with Rule 151. (A-15). The court relied solely on Austin v. Southeastern Pennsylvania Transportation Authority, 450 A.2d 98, 304 Pa. Super. 56 (1982), which relied on Star Rule *350 (Philadelphia Civil Rule 130) (A-36-38), which calls for sixty days notice by publication in the Legal Intelligencer. See Taylor v. Oxford Land, Inc., 488 A.2d 59, 338 Pa. Super. 609 (1985). No such notice was ever given to Plaintiff.

By Motion for Reconsideration and a request for a hearing, Plaintiff's counsel

sought to inform the lower court that: a) a Certificate of Readiness had been filed and was erroneously rejected; b) Defendants waived their right to a non pros; and c) no notice had been given to Plaintiff and no publication had been made as required by Star Rule *350 to enable the lower court to order a non pros. (A-36).

Plaintiff-Appellant (hereinafter Appellant) next appealed to the Superior Court for the Eastern District of Pennsylvania. Appellant asserted that she was being denied her opportunity to be heard in Court as guaranteed by the Fourteenth Amendment of the United States Constitution. The Superior Court cited the lower Court's assertion that Appellant never filed nor attempted to file a Certificate of Readiness and also stated that the parties and witnesses memories had faded and concluded such would prejudice Appellees (A-8-12), despite the fact that Mr. Wankoff and all the key witnesses were deposed, and that the witnesses deposed were able to recall

essential material facts of the case.

Appellant thereafter filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania on November 17, 1987. Appellant again asserted she was being denied her opportunity to be heard in a Court of Law as guaranteed by the Fourteenth Amendment to the United States Constitution and that she was being denied her day in Court because of a complex administrative rule which has since been revoked by the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania, without opinion, rejected Appellant's petition (A-3).

Finally on April 6, 1988, Appellant applied to the Supreme Court of Pennsylvania for a Reconsideration of the Petition. Appellant asserted therein that the lower court's opinions were factually inaccurate and materially incorrect and further that Appellant was being denied her day in court in violation of the Fourteenth Amendment to the United States Constitution. The Supreme Court

of Pennsylvania, again without opinion, rejected the Application for Reconsideration. (A-1-2).

Appellant (hereinafter Petitioner) now applies for a Writ of Certiorari to the United States Supreme Court seeking to have her opportunity to be heard in court, as guaranteed by the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURT'S ACTION/INACTION VIOLATED DUE PROCESS.

A fundamental requirement of the Due Process clause of the Fourteenth Amendment of the United States Constitution is that an individual be given an opportunity to be heard before he or she is deprived of any significant property interest. Cleveland Bd. of Educ. v. Laudermill, 470 U.S. 532, 542 (1985) [quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)]. An individual's ". . . cause of action is a valuable property

within the generally accepted sense of that word, and, as such, it is entitled to the protections of the Constitution." Link v. Wabash Railroad Company, 370 U.S. 626, 646 (1962) (Black, J., dissenting) (4-3 decision); See also Martinez v. California, 444 U.S. 277, 281-2 (1980). "Rights of property which have been created by the common law cannot be taken away without due process." Gronne v. Abrams, 793 F.2d 74 (2nd Cir. 1986) [quoting from Munn v. Illinois, 94 U.S. 113, 134 (1876)].

In the case at bar, Petitioner's personal injury action, which was created by the common law of Pennsylvania, was a significant property interest which could not be denied without due process. Despite this fact, the lower court denied Petitioner her day in court in a highly abusive, arbitrary, and capricious manner. In short, the lower court based its judgment on erroneous factual conclusions and on an erroneous application of the law.

The lower court opinion read:

> In point of fact, [Petitioner] has never filed a certificate of readiness nor attempted to

> do so until the filing of this petition . . . [N]o activity has taken place in the instant case between July of 1981 and February of 1986.

(A-15-16).

The judgment of the lower court rested on these facts, and a close reading of the opinion indicated that had these facts been to the contrary, its ruling would have been in Petitioner's, rather than Respondents', favor. The lower court based its conclusion of facts on a review of the docket entries and the Answers to Plaintiff's Petition. However, Petitioner's Motion for Reconsideration clearly demonstrated that Petitioner filed a certificate of readiness on August 18, 1980. (See Point II, infra).

Also, contrary to the lower court's conclusion, is the fact that Petitioner prosecuted her cause of action to the fullest extent possible after July of 1981. Petitioner's counsel participated in two depositions in August and September of 1982 and made periodic phone calls to the court

inquiring about the approximate date of trial. (A-46 and A-47-48). Since trial waits of 4 to 5 years or more where not uncommon in this venue in the early 1980's, Petitioner had no reason to suspect anything peculiar. Therefore, there was no "long period of delay" in the case at bar as the lower court concluded, (A-16), because the trial wait was not inordinately longer than that which was expected at the time this case was commenced. It was not until the trial wait seemed unduly long, in June of 1986, that Petitioner finally ascertained that no trial was scheduled because the filing of a certificate of readiness was not indicated in the docket.

Furthermore, the docket showed a lack of activity by all parties for several years because there were no pleadings left to file after July of 1981. The bulk of the work was completed and the only thing left for the parties to do was either await trial or to agree to settle before trial. In fact, the parties did engage in settlement negotiations

in early 1981, and thereafter awaited trial together, deliberately, consentually and without objection. Therefore, Respondents' assertion that they were prejudiced by the trial wait was unfounded because their active involvement in trial preparation and their failure to protest the length of the wait indicated that it was acceptable to them. In Pennsylvania, the right to a non pros may be waived if there is conduct indicating a willingness on Appellee's part to try the case on the merits. See Pennsylvania R. Co. v. City of Pittsburg, 335 Pa. 449, 6 A.2d 907 (1939); American Bank and Trust Co. of Pennsylvania v. Ritter, Todd and Haayen, 274 Pa. Super 285, 418 A.2d 408 (1980); and Poluka v. Cole, 222 Pa. Super 500, 295 A.2d 132 (1972).

Respondents' failure to protest during the trial waiting period, indicated a clear willingness to go to trial. Their diligence in preparing for trial, together with their silent acquiescence of the trial waiting

period, was a clear waiver of any right to a non pros.

Clearly, the lower court's decision was unjustified and erroneous considering the gross mistatement and misapplication of the facts of the case at bar. The lower (motion) court failed to give consideration to the fact that Petitioner filed a Certificate of Readiness. It also failed to take into consideration the fact that both Petitioner and Respondents agressively acted on the case after July of 1981 in anticipation and expectation of trial. "[I]f the court's judgment is manifestly unreasonable as shown by the evidence of record, discretion is abused." Murphey v. Hatala, 504 A.2d 917, 920, 350 Pa. Super. 433, 439 (1986). Clearly, the judgment of the lower court in the case at bar was unreasonable considering the gross error in its factual conclusions.

In Whitman v. Riddell, 471 A.2d 518, 324 Pa. Super. 172 (1984), the trial court considered the testimony of the Plaintiff's

counsel, at a hearing, before granting the Defendant's motion for non pros. Id at 519. The appellate court affirmed stating that "[t]he Plaintiff must be given the benefit of all favorable evidence and all reasonable inferences arising therefrom." Id at 520. In the case at bar, however, Petitioner never was given the opportunity to present testimony at a hearing, nor was she given the benefit of all favorable evidence. The lower court had no hearing, no sworn testimony, no cross examination, no inquiry and no substantiating documentation upon which to make a factual conclusion.

In addition to the lower court's erroneous conclusions of fact mentioned above, the lower court further abused its discretion by misapplying the law of Pennsylvania. The lower court rested its judgment solely on the decision in Austin v. Southeastern Pennsylvania Transportation Authority, 450 A.2d 98, 304 Pa. Super. 56 (1982), (A-16), which was the only case cited in the lower

court's opinion. However, the situation in Austin was not even remotely related to the case at bar. Austin involved an appeal of an action dismissed pursuant to Philadelphia Star Rule *350, which provided for the dismissal with prejudice of a civil action where the docket indicates a lack of action for two successive years provided that ". . . no less than sixty (60) days' notice be given by publication once in the Legal Intelligencer." (A-21).

In Austin, the Plaintiff appealed the lower court's dismissal of the case pursuant to Star Rule *350, arguing that Star Rule *350 was invalid because it conflicted with Pennsylvania Rule of Civil Procedure 236. Austin at 99. The Superior Court rejected this argument and affirmed the decision of the lower court. Id.

Respondent in the case at bar never filed for dismissal under Star Rule *350 and Petitioner was never provided with the sixty days' notice mandated by Star Rule *350. See

Taylor v. Oxford Land, Inc., 488 A.2d 59, 61, 338 Pa. Super. 609 (1985). Therefore, there was no reason for the lower court to take Star Rule *350 into consideration, let alone make a ruling based on its enforcement. (A-36-38). "A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether." Hovey v. Elliott, 167 U.S. 409, 415 (1897); See also Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). By resting its decision solely on Austin, the lower court misapplied the law of Pennsylvania and failed to properly support its judgment. Such a misapplication of the law constituted an abuse of the lower court's discretionary powers and resulted in an arbitrary and capricious decision. See Braderman v. Braderman, 488 A.2d 613, 615, 339 Pa. Super. 185, 191 (1985). Pennsylvania common law holds that a "non pros" will be reversed if there is a manifest abuse of discretion by the

lower court. Drakes Mills Develop v. Northeast Penn., Etc., 441 A.2d 1338, 1339, 295 Pa. Super. 487, 490 (1982).

The lower court in the case at bar abused its discretion in rendering its judgment of "non pros", and the Supreme Court of Pennsylvania should have properly reversed that judgment after being enlightened of the erroneous conclusions of fact and misapplication of the law by the lower court. "Procedural due process rules are meant to protect persons not from deprivation, but from mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435 U.S. 247, 259 (1978). The mistakes of facts and law of the state courts in the case at hand resulted in a deprivation of Petitioner's property interest in her cause of action. The mistaken and unjustified decision of the state courts frustrated Petitioner's attempt to ensure her due process rights, because she was deprived of her fundamental right to an opportunity to be heard on the merits of her

case. The proper exercise of discretion ". . . [t]akes account of law and the particular circumstances of the case and is directed by the reason and conscience of the judge to a just result." Burns v. United States, 287 U.S. 216, 223 (1932) [quoting Langnes v. Green, 282 U.S. 531, 541 (1931)]. If the lower court took note of applicable law and the actual circumstances of the case at bar, common sense dictates that a judgment granting Petitioner's leave to file a Certificate of Readiness would have been the proper and just result. All discovery and all mandated pleadings under existing rules were completed. This case was ready for trial and it was an injustice to prevent Petitioner from seeking a judgment on the merits.

Given the particular circumstances of the case at bar, it would be a constitutional error to uphold the unjustified ruling of the Supreme Court of Pennsylvania. "Applying due process is . . . an uncertain enterprise which must discover what 'fundamental fairness'

consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." Lassiter v. Department of Soc. Serv. of Durham Cty., 452 U.S. 18, 24-25 (1981). In furtherance of this two-part test, there are two relevant precedents which can be considered.

In Hovey (See p.14 infra), the Court held that the Supreme Court of the District of Columbia had abused its discretion under District of Columbia law by entering a decree against the Defendant simply because he was found guilty of contempt. Hovey at 446-447. The Court found that this abuse of discretion violated due process because it denied the Defendant his constitutional right to a day in court. Id at 444. The case at bar can be likened to Hovey in that Petitioner was also denied her day in court.

In Bennett v. Bennett, 208 U.S. 505 (1908), the Court developed the rule that when a state court unreasonably exercises or abuses

its discretion, the case should be reviewed by the Court. There was a clear abuse of discretion in the case at bar, and, therefore the Bennett rule requires certiorari by the Court. These precedents, together with the case law cited throughout this petition show that Petitioner's due process rights were violated.

The several interests in the case at bar weigh heavily in Petitioner's favor. Petitioner petitioned for leave to file a Certificate of Readiness nonpro tunc. Respondents were content to enter into settlement discussions, hold depositions, complete discovery and wait for trial which, at that time, was anticipated to be several years away. Therefore, Respondents waived their interest in the case through their conduct which indicated a willingness to try the case on its merits. (See pp. 20-21, infra). The state interests in upholding Rule 151 and the "240 Day Rule" are now moot, because both rules were repealed. (A-34 and A-35).

Hence, in consideration of the apparent abuse of discretion by the lower court and in furtherance of fundamental fairness, this Court should grant certiorari and ensure the rights of Petitioner to a fair opportunity to be heard on the merits.

II. THE UNAUTHORIZED ACTION OF THE PROTHONOTARY VIOLATED PETITIONER'S CONSTITUTIONAL GUARANTEES

A state may not terminate a Plaintiff's cause of action merely because a state official, for reasons beyond Plaintiff's control, failed to comply with statutorily mandated procedure. Logan v. Zimmerman Brush Co., 455 U.S. 422, 424-437 (1982). "[T]he Fourteenth Amendment's Due Process clause has been interpreted as preventing the states from denying potential litigant's use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'" Id at 429-430 (quoting Boddie at 380).

The state, through action of its Prothonotary, unjustly and without authorization returned Petitioner's timely-filed Certificate of Readiness. No state or local rule of the court gives the Prothonotary the authorization or discretion to refuse or return papers which are facially valid and timely filed, except Philadelphia Civil Rule 40(B), which mandates that:

> The Prothonotary must accept all documents for filing which conform to the requirements in Section A except:
>
> > (1) Those documents which relate to the entry or satisfaction of judgment or the issuance of a writ of execution and documents which terminate an action in whole or part . . ., and
> >
> > (2) the withdrawal of appearance of attorney . . .

(A-40-41). Petitioner's Certificate of Readiness was a pre-printed court form. (A-44). Therefore, the Prothonotary was statutorily mandated to accept Petitioner's facially valid Certificate of Readiness for filing, since neither of the exceptions under

Rule 40(B) applied, and because the filing was in conformance with Rule 151, which was then in force.

Rule 151 merely required Petitioner's counsel to certify that the case would be ready for trial when the "case first appear[ed] on a published trial list." (A-44). Since the case at bar was not expected to appear on a published trial list for several years, Petitioner's filing of the Certificate of Readiness was valid. The mere fact that preliminary objections had been filed by the University was not a justifiable reason for the Prothonotary to reject the Certificate of Readiness. It was reasonable to assume that the preliminary objections would have been resolved well before the case would even have been listed for trial. Furthermore, these preliminary objections were filed more than fifty days late according to Rule 26(a) of the Pennsylvania Rules of Civil Procedure. Therefore, the Prothonotary would have been more justified in returning the

preliminary objections rather than the timely filed Certificate of Readiness.

Moreover, the Prothonotary's action of returning the Certificate of Readiness was an independent action which was not authorized under local rules. This was the type of action which the Logan court sought to prevent. Such action by a state official was beyond Petitioner's control and ultimately resulted in the erroneous dismissal of the action. There was no way that Petitioner could have anticipated the arbitrary action of the Prothonotary, hence, it was beyond her control. Had the Prothonotary abided by mandated procedure, Petitioner's Certificate of Readiness would not have been returned and a trial on the merits would have been concluded.

Considering that Rule 151 was repealed three years before the issue of Petitioner's filing came before the lower court, and in light of Respondents' apparent willingness to go to trial on the merits and the fact that

the Certificate of Readiness should have been accepted by the Prothonotary under state law, the Court should grant certiorari and ensure that Petitioner has a fair opportunity to be heard on the merits.

CONCLUSION

A man was seriously injured and incapacitated by a tractor-trailer backing up the wrong way on a one-way street. He and his family suffered grievously. He passed away and his widow (estate) sought to continue the pursuit of justice -- compensation for losses and damages. It is obvious that Petitioner always sought to pursue her rights, yet she has suffered a double tragedy. First the injury to her husband and family. Then the Motion (lower) Court deprived Petitioner of her right to go forward -- to pursue justice.

Almost all of the procedural wrangling in this case was initiated and conducted among the original Defendants and the Additional Defendant.

Rules of Court are not promulgated to obstruct, deny or prevent a meritorious claim from being heard. To the contrary, Rules of Court, in part, are created in order to establish an orderly and efficient administration of justice. In the case at bar, the rules involved proved to be counter-productive, and subsequently they were repealed. Nevertheless, Petitioner sought to comply with those rules, but Petitioner's efforts were thwarted by the unauthorized action of the Prothonotary (Clerk of Courts).

Still, all parties proceeded to complete all pleadings and all discovery, and awaited a trial or settlement. All depositions were conducted with the "usual stipulations" thereby allowing much greater latitude than would be permitted at trial. Much more information was gained. Testimony, memories and recollections were memorialized. This case was, and is, ready for trial.

The Motion Court which rendered a judgment of non pros neither held a hearing

nor took testimony nor heard oral argument. And when facts and law inconsistent with the Motion Court's finding were presented, the Motion Court refused Reconsideration, again, without a hearing, without testimony, and without oral argument. Subsequently, Pennsylvania's Appellate Courts looked only to the alleged facts which the Motion (lower) Court presumed. The Appellate Courts neglected to ask and failed to rule upon the following questions: Why was there no hearing?; Why were no facts testified to?; Did the Prothonotary have the right to reject Petitioner's Certificate of Readiness even though it was timely filed?; Did Respondents waive their privilege of a motion for non pros by their failure to act for 4 years and their active participation in the pre-trial process?; Who is seriously prejudiced and to what extent?; Where proper notice is required, why was notice not given?; Has the Petitioner been denied her constitutional rights?

This case represents a cry in the night

by an injured party who was victimized by state Courts that were too busy to grant her a hearing, too rigid to admit that they were not possessed of all the facts, and too pre-determined to realize that they had misapplied the law. Therefore, your Petitioner asks this HONORABLE COURT for justice as a process, as well as justice as a result.

It is prayed that this HONORABLE COURT will grant certiorari and ensure the rights of the Petitioner to a full and fair hearing.

Respectfully submitted,

MALCOLM P. ROSENBERG, ESQUIRE
1201 Chestnut Street, 13th Floor
Philadelphia, Pennsylvania 19107
(215) 557-9690

APPENDIX

Pennsylvania Supreme Court Order dated July 25, 1988	A-1-2
Pennsylvania Supreme Court Order dated March 22, 1988	A-3
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SUPREME COURT OF PENNSYLVANIA

Eastern District
468 City Hall
Philadelphia, PA 19107
(215) 496-4600

July 28, 1988

Malcolm P. Rosenberg, Esq.
1201 Chestnut Street, 13th Floor
Philadelphia, PA 19107

RE: Evelyn Wankoff, ADMX, of the Estate of Irvin Wankoff, Dec'd., and Evelyn Wankoff in Her Own Right, Petitioner v. Thomas Tibbs and Consolidated Freightways Corp., et al.
NO. 893 E.D. ALLOCATUR DOCKET 1987

Dear Mr. Rosenberg:

This is to advise you that the following Order has been endorsed on your Application for Reconsideration of Denial of Petition for Allowance of Appeal, filed in the above captioned matter:

"July 25, 1988

Petition Denied

Per Curiam."

Very truly yours,

S.
Patrick Tassos,
Deputy Prothonotary

PT/rf

cc: Charles P. Mensazk, Jr., Esq.
Charles Jay Bogdanoff, Esq.
Rex R. Gary, Esq.

SUPREME COURT OF PENNSYLVANIA

Eastern District
468 City Hall
Philadelphia, PA 19107
(215) 496-4600

March 30, 1988

Malcolm P. Rosenberg, Esq.
1201 Chestnut Street, 13th Floor
Philadelphia, PA 19107

RE: Evelyn Wankoff, et al., Petitioner v.
Thomas Tibbs, et al.
NO. 893 E.D. ALLOCATUR DOCKET 1987

Dear Mr. Rosenberg:

This is to advise you that the following Order has been endorsed on the Petition for Allowance of Appeal, filed in the above captioned matter:

March 22, 1988

Petition Denied.

Per Curiam."

Very truly yours,

S.
Patrick Tassos,
Deputy Prothonotary

PT:ejh
cc: Charles P. Mensazk, Jr., Esq.
Rex R. Gary, Esq.

EVELYN WANKOFF, ADMINISTRATRIX OF THE ESTATE OF IRVIN WANKOFF, DECEASED and EVELYN WANKOFF, IN HER OWN RIGHT, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
THOMAS TIBBS and CONSOLIDATED FREIGHTWAYS CORP. and THOMAS JEFFERSON UNIVERSITY HOSPITAL, Appellees	:	No. 2614 Philadelphia 1986

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Philadelphia County be, and the same is hereby AFFIRMED.

BY THE COURT:

S.
DAVID A. SCZEWZAK
Prothonotary

Dated: 10/16/87

EVELYN WANKOFF, ADMINISTRATRIX OF THE ESTATE OF IRVIN WANKOFF, DECEASED and EVELYN WANKOFF, IN HER OWN RIGHT, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
THOMAS TIBBS and CONSOLIDATED FREIGHTWAYS CORP. and THOMAS JEFFERSON UNIVERSITY HOSPITAL, Appellees	:	No. 2614 Philadelphia 1986

Appeal from the Order Entered August 20, 1986, in the Court of Common Pleas of Philadelphia County, Civil No. 5088 Oct. Term 1979.
BEFORE: OLSZEWSKI, DEL SOLE, and BECK, JJ.

MEMORANDUM:

Appellant, Evelyn Wankoff, appeals from an order of the Court of Common Pleas of Philadelphia County that denied her petition for leave to file a certificate of readiness nunc pros in favor of appellees, Thomas Tibbs, Consolidated Freightways Corp., and Thomas Jefferson University Hospital. On appeal, appellant contends that the trial court abused its discretion by denying her petition for leave to file a certificate of readiness nunc pro tunc and entering a

judgment of non pros in favor of appellees. We, however, find appellant's contentions to be without merit and, accordingly, affirm the order of the trial court.

Before addressing the merits of appellant's contention, a brief recitation of the relevant facts is necessary. Irvin Wankoff sustained personal injuries in an accident that occurred on June 12, 1978. In October 1979, Mr. Wankoff instituted an action against appellees Thomas Tibbs and Consolidated Freightways Corp. Numerous legal pleadings were filed by the parties between October 1979 and November 1981. Further, as the trial court opinion aptly stated:

> Pursuant to Local Rule of Court [former Phila. R.C.P. 151], plaintiff [appellant] was required to file a certificate of readiness on or before August 31, 1980. Plaintiff having failed to do so, plaintiff applied to the Court for an extension of time within which to file a certificate of readiness and said request was granted and the time extended until December 3, 1980. This request was received by and granted by the Honorable Stanley Greenberg. Unfortunately, plaintiff did not file a certificate of

> readiness either before August, 1980, or before December 3, 1980. In point of fact, plaintiff has never filed a certificate of readiness nor attempted to do so until the filing of this petition [for leave to file a certificate of readiness nunc pro tunc], which took place on June 20, 1986.

Trial court opinion of August 20, 1986 at pp. 1-2. On March 25, 1983, Mr. Wankoff died, but a suggestion of death was not filed until February 7, 1986, when Evelyn Wankoff, executrix of Mr. Wankoff's estate, was substituted as plaintiff for the decedent. As previously noted, on June 20, 1986, five and one-half years after expiration of the court-granted extension period for filing a certificate of readiness, appellant filed a petition for leave to file a certificate of readiness nunc pro tunc. Appellees responded by filing answers to appellant's petition, as well as a motion for a judgment of non pros against appellant. On August 20, 1986, the trial court entered an order denying appellant's petition and granting appellee's motion. Appellant subsequently filed this

timely appeal.

On appeal, appellant contends that the trial court erred by entering an order denying appellant's petition for leave to file a certificate of readiness nunc pro tunc and entering judgment of non pros against appellant. In Moore v. George Heebner, Inc., 321 Pa. Super. 226, 467 A.2d 1336 (1983), this Court stated the applicable standard of appellate review in cases involving a judgment of non pros. We noted:

> It is well settled law that the question of granting a non pros because of failure of a plaintiff to prosecute his action within a reasonable time rests within the discretion of the lower court and the exercise of such discretion will not be disturbed on appeal unless there is proof of a manifest abuse thereof.

Id. at _____, 467 A.2d at 1337 (quoting Gallagher v. Jewish Hospital Assn., 425 Pa. 112, 113, 228 A.2d 732, 733 (1967)). In the present case, we find that the trial court did not abuse its discretion in entering a judgment of non pros in favor of appellees.

Non pros, an abbreviation of non prosequitur, "refers to a judgment, entered at the instance of the defendant, involuntarily terminating an action on the ground of the plaintiff's delay in prosecution at any stage of the proceeding, without bar to a new action on the same cause." 7 Standard Pennsylvania Practice 2d at p. 275. In Cathcart v. Keene Industrial Insulation, 324 Pa. Super. 123, 471 A.2d 493 (1984), this Court stated, "A [trial] court properly enters a judgment of non pros when a party to the proceedings has shown a want of due diligence by failing to proceed with reasonable promptitude, when there has been no compelling reason for the delay, and when the delay has caused some prejudice to the adverse party." Id. at ____, 471 A.2d at 498 (citing Carter v. Amick, 246 Pa. Super. 520, 534, 371 A.2d 961, 963 (1977)).

In the instant situation, the trial court properly entered a judgment of non pros in favor of the appellees. Appellant has first shown a want of due diligence by failing to

proceed with reasonable promptitude. A period of five and one-half years passed between the expiration of the court granted extension period for filing a certificate of readiness in December 1980 and appellent's filing of a peititon nunc pro tunc in June 1986. A five and one-half year delay established lack of due diligence on the part of appellant, especially when appellant had previously been granted a three month extension for the filing of a certificate of readiness. Second, the only reason appellant offered for the five and one-half year delay was a technical oversight on the part of appellant's counsel caused by the confusion and large volumes of work resulting from enactment of Phila. R.C.P. 151 (since rescinded). In International Telephone and Telegraph Corp. v. Phila. Electric Co., 250 Pa. Super. 378, 378 A.2d 986 (1977), however, this Court, confronted with the question of whether a judgment of non pros was properly entered, stated: "The oversight or negligence of appellee or its counsel is not

an acceptable excuse unless reasonably explained." Id. at _____, 378 A.2d at 989 (emphasis added). We reject appellant's excuse regarding counsel's oversight as without merit since even initial confusion concerning application of a new rule does not justify a five and one-half year delay in seeking permission to file a certificate of readiness subsequent to expiration of an original three month extension period. Last, the delay has caused significant prejudice to appellees' case. As appellees Thomas Tibbs and Consolidated Freightways Corp.'s brief succinctly stated:

> In the instant case, it is clear that the defendants [appellees] have suffered great prejudice as a result of the delay. Plaintiff died from non-related causes. Defendants are, therefore, unable to cross-examine the plaintiff concerning his comparative negligence during the trial. Defendants are also precluded from conducting an eve of trial medical examination. Defendants have also been prejudiced by the fact that almost nine years have passed since the date of the accident giving rise to this litigation. It is only natural that all of the parties and witnesses' memories will have faded in that time span.

> Several of the witnesses are no longer in the co-defendant's [Thomas Jefferson University Hospital] employment and their current whereabouts are unknown.

Brief of appellees Thomas Tibbs and Consolidated Freightways Corp. at p. 12.- The trial court, consequently, did not abuse its discretion in denying appellant's petition and entering a judgment of non pros in favor of appellees.

Order affirmed.

EVELYN WANKOFF, Administratrix of the Estate of IRVIN WANKOFF, Deceased, and EVELYN WANKOFF, in her own right,	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
v.	:	OCTOBER TERM, 1979
THOMAS TIBBS and CONSOLIDATED FREIGHTWAYS CORP. and THOMAS JEFFERSON UNIVERSITY HOSPITAL, Additional Defendant.	:	NO.: 5088

ORDER

AND NOW, this 18th day of September, 1986 it is hereby ORDERED and DECREED that Motion for Reconsideration of Evelyn Wankoff, Administratrix, is DENIED.

BY THE COURT:

S.
ALFRED J. DI BONA, JR.
J.

EVELYN WANKOFF, Administratrix of the Estate of IRVIN WANKOFF, Deceased, and EVELYN WANKOFF, in her own right,	:	COURT OF COMMON PLEAS
v.	:	OCTOBER TERM, 1979
THOMAS TIBBS and CONSOLIDATED FREIGHTWAYS CORP. and THOMAS JEFFERSON UNIVERSITY HOSPITAL, Additional Defendant	:	NO.: 5088

OPINION AND ORDER

DI BONA, J.

Presently before the Court is plaintiff's petition for leave to file certificate of readiness nunc pro tunc. In response to the petition, answers have been filed thereto by defendants Thomas Tibbs and Consolidated Freightways Corp. and Thomas Jefferson University Hospital. In addition, motions for judgment of non pros have been asserted by both defendants. In response to the judgment of non pros, plaintiff has filed a reply memorandum.

The facts bearing on the instant petition

are as follows. Plaintiff sustained personal injuries in an accident which occurred on June 12, 1978. In October of 1979, plaintiff instituted an action against the defendants. Between 1979 and 1981, numerous legal pleadings were filed by the parties, the last of which occurred on July 9, 1981. Pursuant to Local Rule of Court, plaintiff was required to file a certificate of readiness on or before August 31, 1980. Plaintiff having failed to do so, plaintiff applied to the Court for an extension of time within which to file a certificate of readiness and said request was granted and the time extended until December 3, 1980. This request was received by and granted by the Honorable Stanley Greenberg. Unfortunately, plaintiff did not file a certificate of readiness either before August, 1980 or before December 3, 1980. In point of fact, plaintiff has never filed a certificate of readiness nor attempted to do so until the filing of this petition, which took place on June 20, 1986.

A review of the docket entries and a review of the answers to plaintiff's petition reveal that no activity has taken place in the instant case between July of 1981 and February of 1986, when a suggestion of death was filed by Plaintiff. Despite this inordinately long period of delay, Plaintiff now seeks leave of Court to file a certificate of readiness nunc pro tunc. In opposition thereto, the defendants request that a judgment of non pros be entered against the plaintiff. After reviewing all the facts of the instant case and reviewing the prejudice which would be suffered by the defendants should this case proceed, this Court is inclined to deny plaintiff's petition for leave to file certificate of readiness nunc pro tunc and will grant the defendants' motion for judgment of non pros. The delay has been too long, the prejudice too severe, and the grant of plaintiff's petition is totally unwarranted. Accordingly, due to the above, judgment of non pros will be entered as below. See, Austin v.

SEPTA, _____ Pa. Super. _____, 450 A.2d 98 (1982). Therefore, the following:

ORDER

AND NOW, this 20th day of August, 1986, upon consideration of plaintiff's petition for leave to file certificate of readiness nunc pro tunc and the answers thereto filed by the defendants, as well as the petition for judgment of non pros filed by the defendants and the response thereto filed by the plaintiff, it is hereby ORDERED and DECREED that plaintiff's petition for leave to file certificate of readiness nunc pro tunc be and is hereby denied. It is FURTHER ORDERED and DECREED that a judgment of non pros is entered against the plaintiff and in favor of defendants, Thomas Tibbs and Consolidated Freightways Corp. and in favor of additional defendant, Thomas Jefferson University Hospital, and against defendants and plaintiff.

BY THE COURT:

S.
ALFRED J. DI BONA, JR.
J.

WOLOV & ROSENBERG
BY: Terry J. Siman, Esquire
I.D. No. 26953
215 S. Broad Street
Seventh Floor
Philadelphia, PA 19107

IRVIN WANKOFF and EVELYN WANKOFF, h/w	:	COURT OF COMMON PLEAS
v.	:	
	:	OCTOBER TERM, 1979
THOMAS TIBBS and CONSOLIDATED FREIGHTWAYS, CORP.	:	NO. 5088

ORDER

After consideration of the within Petition for Extension of Time under Phila. R.C.P. 152, the Petition is granted and the date by which the Certificate of Readiness must be filed extended to December 31, 1980.

J.S.
STANLEY GREENBERG
October 1, 1980

SUPREME COURT

[No. 161, E.D. Misc. Doc. 1979]

PROMPT CERTIFICATION FOR
TRIAL OF CIVIL CASES

ORDER

And now, November 19, 1979, effective immediately, pursuant to authority conferred upon the Supreme Court of Pennsylvania by Article V, Section 10 of the Constitution, in order to expedite the prompt and proper movement and disposition of civil cases in the trial courts of Pennsylvania, it is ordered that:

1. Prompt Certification for Trial.

(a) In all civil actions commenced on or before December 31, 1979, any and all documents required to signify that the case is ready for trial must be filed on or before August 31, 1980. In civil actions commenced on or after January 1, 1980, such documents must be filed not more than 240 days after the action is commenced.

(b) Prior to the expiration of the period limited in Paragraph (a), any party may apply for extension of such period. The application must be served on all other parties and must set forth the grounds for the request and the length of extension required. The court may grant the extension only upon finding good cause. The order of extension, if any, shall set forth the new date for certifying trial readiness, which may be sooner than that requested, but may not be later.

(c) If the documents are not filed within the time limits above, the court, with or without motion by any party, shall require that good cause be shown why the case should not be dismissed for want of prosecution.

(d) For purposes of this order

(i) Documents required to signify that a case is ready for trial include certificates of readiness, praecipe for trial or other writing required by local rule.

(ii) A civil action is commenced when the first praecipe for writ or complaint is

filed.

(iii) Notwithstanding any other local rule or practice, civil actions shall be processed under Paragraph (c) in order of their commencement.

2. Pretrial Conferences in Civil Cases.

(a) Unless dispensed with by the court as unnecessary, a pretrial settlement conference shall be held in each civil case. In addition to full and candid exploration of possible settlement of the case, the attorneys for the parties, with the assistance of the judge assigned, shall consider:

(i) Simplification of the issues;

(ii) Requests for amendments of the pleadings;

(iii) Possible admissions of facts or documents or other stipulations which will avoid unnecessary proof;

(iv) Limitation of the number of expert witnesses;

(v) Advisability of a preliminary reference of issues to a master for findings

to be used as evidence in a jury trial; and

(vi) Any other matter which will aid in disposing of the action.

(b) The judge shall make or cause to be made a complete record of any agreement reached or action taken at the conference, for the use of the court and parties in subsequent proceedings, if any.

(c) Only attorneys fully familiar with the action and authorized by their clients to discuss settlement of all or part of the action shall be admitted to the conference. All attorneys must bring their files, together with any additional materials required by local rule, to the conference. Failure of any attorney to appear as agreed, to be prepared to state his position candidly, or to bring all essential materials shall be regarded as a calendar default.

(d) Each court shall establish by local rule a pretrial settlement conference list, and fix the method of placing actions on such list. Local rules seeking to exempt one or

more types of actions from conferences shall not be adopted or utilized without express approval of the Supreme Court.

BY THE COURT:

S.
M.J. EAGEN, Chief Justice

[Pa. B. Doc. No. 79-1724. Filed November 30, 1979, 9:00 a.m.]

GENERAL COURT REGULATION 80-7

TO: ALL COMMON PLEAS COURT JUDGES

FROM: EDWARD J. BRADLEY, PRESIDENT JUDGE

RE: NEW COURT RULE 151

Philadelphia Common Pleas Court Rule 151 is enacted effective July 1, 1980:

Rule 151. Prompt Certification for Trial in Civil Actions

(A) Prompt Certification for Trial

As required by Supreme Court Order 161 dated November 19, 1979, in all civil actions commenced or or before December 31, 1979, a Certificate of Readiness in the form required by this Court must be filed with the Prothonotary on or before August 31, 1980. In all civil actions commenced or or after January 1, 1980, a Certificate of Readiness must be filed not more than 240 days after the date the action was commenced.

(1) Commencement of Action

For the purposes of the Supreme Court

Order and this rule, a civil action is commenced when a praecipe for a writ of summons, a complaint or an agreement for an amicable action is filed with Prothonotary.

(2) Extension of time for Filing Certificate

Prior to the expiration of the period stated above, any party may apply for an extension of the period. A party seeking an extension must follow the procedure set forth herein. A petition for an extension will be granted for a specified period only upon a finding of good cause.

(3) Contents of Petition for Extension

(a) A petition for an extension of the period stated above must be made in writing, in petition form, and shall contain:

(i) The date on which the action was commenced and the date by which a Certificate of

Readiness is required to be filed, and whether it is a major case or an arbitration case;

(ii) A short, concise statement of the grounds for the request. If any of the reasons or facts stated do not appear of record, the petition must be verified by the party; otherwise it must be verified by counsel.

(iii) The date by which the extension is requested; and

(iv) A certification that a copy of the petition has been served on all other parties, and a statement of the date and manner of service (e.g., by mail or hand-delivery).

The petition shall be accompanied by a verification or jurat by the filing counsel.

(b) The following must be filed with

the petition for an extension:

(i) A proposed order granting the request, which shall include the new date by which a Certificate of Readiness must be filed;

(ii) A true and correct copy of the current docket entries in the case; and

(iii) A 9½" x 4½" stamped, self-addressed envelope (the envelope must be filed only with the copy of the petition which is delivered to the Deputy Court Administrator for Civil Administration).

(4) Filing of Petitions for Extension

Petitions for extension of the period shall be filed with the Prothonotary and docketed in the normal manner. Counsel filing the petition shall then immediately deliver a copy to the Deputy Court Administrator for Civil

Adminsistration in Room 395-A City Hall.

(5) Answer to Petition for Extension

Counsel desiring to oppose a petition for extension must file an answer to the petition with the Prothonotary within seven (7) days after service thereof and shall serve a copy on all parties and on the Deputy Court Administrator for Civil Administration.

(6) Contents of Answer to Petition for Extension

The answer shall contain a seriatum response to the averments of the initial petition, including:

(a) A brief, concise statement of the grounds why the request should not be granted. If any of the reasons or facts stated do not appear of record, the answer must be verified by the party; otherwise it must be verified by counsel;

(b) A certification that a copy of the answer has been served on all other parties and a statement of the date and manner of service.

(c) The following must be filed with any answer to an application for extension:

(i) A proposed order denying the petition and directing that a Certificate of Readiness be filed within ten (10) days of the order or upon the expiration of the 240-day period, whichever is later, or the case will be dismissed by the Court for want of prosecution; and

(ii) A 9½" x 4½" stamped, self-addressed envelope (the envelope must be included only with the copy of the answer which is served on the Deputy Court Administrator for Civil

Administration).

(7) Requirements for Non-Responding Parties

Parties who choose not to file an answer shall nevertheless be required to forward to the Deputy Court Administrator for Civil Administration in Room 395-A City Hall, a self-addressed, stamped envelope, within seven (7) days after service of the petition, accompanied by a letter of transmittal indicating the caption of the case and naming the party on whose behalf said letter is being sent.

(8) Disposition of Petition for Extension

(a) The Deputy Court Administrator for Civil Administration shall process the petition and refer it for disposition to the appropriate supervising judge. The matter will be disposed of by petition and answer (if one has been filed)

unless the supervising judge deems it necessary to hold a hearing or to have argument on the petition, in which case counsel will be notified of the date and place thereof. If the supervising judge determines that the petition was filed solely for the purpose of delay or if it is determined that any of the parties involved have improperly sought to delay the movement of the case towards trial, the supervising judge may, after notice and hearing, impose such sanctions as are appropriate.

(b) Notice of the disposition of the petition will be given by mailing a copy of the order to all interested counsel. If the petition for extension is denied, the Court shall direct that a Certificate of Readiness be filed within ten (10) days of the date

of the order, prior to the expiration of the 240-day period, whichever is later, or the case shall be subject to dismissal by the Court for want of prosecution.

(c) The filing of a petition for extension shall operate as an extension of the required time period until further ordered by the Court.

(9) Dismissal of Actions

(a) Any civil action commenced on or before December 31, 1979 is subject to dismissal by the Court where a Certificate of Readiness or a petition for extension has not been filed by August 31, 1980.

(b) Any civil action commenced on or after January 1, 1980, is subject to dismissal by the Court where a Certificate of Readiness or a

petition for extension has not been filed prior to 240 days of the commencement of the action.

S.
EDWARD J. BRADLEY
President Judge

June 19, 1980

SUPREME COURT

[No. 161 E.D. Misc. Docket 1979]

PROMPT CERTIFICATION FOR
TRIAL OF CIVIL CASES

ORDER OF COURT

And now, to-wit, this 6th day of March, 1981, the above Order dated November 19, 1979, 9 Pa. B. 3936, is vacated effective this date.

BY THE COURT:

HENRY X. O'BRIEN
Chief Justice

[Pa. B. Doc. No. 81-427. Filed March 20, 1981, 9:00 a.m.]

TITLE 249-

PHILADELPHIA RULES

[General Court Regulation 83-4]

Revised Local Court Rules 40, 140, 144.1, 150, 162, 163, 170, 190, 200, 206 and Rescinded Local Rules 151, 155 and 195

To: All Common Pleas Court Judges Civil Distribution

From: Edward J. Bradley, President Judge

Pursuant to adoption by the Board of Judges of the Philadelphia Court of Common Pleas at its meeting of November 17, 1983, the attached amendments, effective immediately, revise local rules to reflect implementation of the individual calendar program. Additions and revisions have been underlined; deletions, however, have been omitted.

EDWARD J. BRADLEY,
President Judge

Rule 130. Disposition of Inactive Cases.

(1) Whenever in any civil action a Certificate of Readiness has not been filed and no proceedings have been docketed in the Prothonotary's Office for a period of two (2) successive years, the action shall be dismissed with prejudice, for failure to prosecute under the provisions of this rule, and the docket so marked, provided that no less than sixty (60) days' notice be give by publication once in The Legal Intelligencer.

(2) Whenever in any civil action a Praecipe or an Order for trial or a Certificate of Readiness has been filed, but thereafter no further action or any disposition has been noted on the docket in the Prothonotary's Office for a period of three (3) successive years, the action shall be dismissed, with prejudice, for failure to prosecute under the provisions of this rule, and the docket so marked; provided that no

less than six (6) months' advance notice thereof be given by publication once in The Legal Intelligencer.

(3) At any time prior to dismissal under (1) or (2) counsel may submit a written certification that the case is still active and setting forth briefly the reasons why no action has been taken in the two or three preceding years.

A second copy of such certification must be lodged with the Deputy Court Administrator, Civil Listings, for transmittal to the Calendar Judge for review of the adequacy of the said certification. Such certification shall be sufficient to prevent the dismissal of the case unless the Court within ten (10) days after filing rejects same.

(4) Dismissal under (1) or (2) is subject to the right of any party to reinstate the action by written application for good cause shown after such dismissal within three (3) months of the date of dismissal. Such application shall be made by petition and

answer filed with the Clerk of the Motion Court pursuant to Rule 140. The Praecipe accompanying the petition must clearly state that this is a petition to vacate a *350 Dismissal.

[Star Rule *350, adopted February 15, 1973; Star Rule *1047A, adopted September 23, 1971, amended November 16, 1972. Rule 130 amended November 15, 1978, effective immediately - Ed.]

Rule 40. Filing of Pleadings, Papers, etc.

(A) All papers filed in the Prothonotary's Office must conform to the following requirements:

(1) Pleadings, opinions, briefs and other papers and records which are to be filed with the Prothonotary must be prepared on letter size (approximately 8½ x 11") paper of customary weight and quality.

(2) The margin on all papers shall be not less than 3/4" on left side of the page and 1/4" on the right side of the page and the material shall be double spaced.

(3) The first page shall contain a 3" space from the top of the page for all stampings, filing notices, waivers and demands for a jury trial and notations. Beginning at the lefthand margin 3" from the top of the page, the firm name, attorney name, attorney identification number, address, and telephone number shall appear in that order. To the

right of the attorney's address, the client's name shall appear.

(4) The case caption shall appear below the attorney address at the left-hand margin of the page with the proper court term and number appearing to the right-hand margin.

(5) The Complaint or other original filing shall contain in the caption the address, including Zip Codes, of the parties.

(6) The first paper filed by a party in a case shall have endorsed thereon an address in the Commonwealth at which all papers and notices thereafter may be served upon him.

(7) In cases assigned to an individual judge, the upper right hand corner of the case caption shall state the name of the judge to whom the case has been assigned.

(B) The Prothonotary must accept all documents for filing which conform to the requirements of Section A except:

(1) those documents which relate to the entry or satisfaction of judgment or the

issuance of a writ of execution and documents which terminate an action in whole or part in which case the Prothonotary shall review the documents and dockets to determine whether the filing complies with the Rules of Civil Procedure; and,

(2) the withdrawal of appearance of an attorney unless there is another entry of appearance or Court approval of the withdrawal.

(C) In all cases arising out of a motor vehicle accident, all papers and pleadings filed shall be conspicuously marked "Motor Vehicle Case" by the party or his attorney filing same, upon the entry of the first paper in the appearance docket. The same description shall be made in the docket.

(D) Whenever any right, claim or defense is asserted to be founded upon a specific statute of this or another jurisdiction or upon an ordinance, governmental regulation or rule of court, the first pleading in which such right, claim or defense is asserted shall

cite, for the information of the court, the statute, ordinance, regulation or rule to be relied upon.

(E) Whenever a party claims relief in the form of money damages, he shall at the conclusion of his pleading state the precise amount of damages claimed by him, and, if entitled to interest, the date or dates from which interest thereon or on any part thereof is claimed.

(F) In actions in which book accounts may be offered in evidence, if a copy thereof is attached to any pleading, it shall not be necessary to produce the books at the trial, unless a responsive pleading shall allege that the account or copy is incorrect, stating particulars, or that the books are not books of original entry and shall demand the production of the books at the trial; otherwise, the copy shall be admitted as evidence without further proof.

(G) Pleadings amended before trial shall be executed, verified and filed in their

amended form. If amendments to pleadings are required to be attached to any brief or other document, it shall be set forth as amended to date.

(H) Notice of Depositions, Request for Production of Documents and Reply or Objections, Request for Admission and Reply or Objections, shall not be filed with the Prothonotary.

(I) This Rule shall not apply to the Orphans' Court Division of the Common Pleas Court.

[General Court Regulation 79-1, effective February 1, 1979; Section (A) amended by General Court Regulation 81-12, effective December 7, 1983, General Court Regulation 83-4, effective December 5, 1983.]

PHILADELPHIA COURT
OF COMMON PLEAS

CERTIFICATE OF READINESS

Court, Term & Number	Type Trial Requested:	Jury Fee Paid:	Amount at Issue:
October Term, 1979 No. 5088	Major ☐ General ☒ Jury ☒ Non-Jury ☐ Arbitration ☐	Yes ☐ No ☒ By:	$ Excess of $15,000 Insurance Carrier: N/A

Pltff(s)
Irvin Wankoff and Evelyn Wankoff, h/w

Deft(s)
Thomas Tibbs and Consolidated Freightways, Corp.

Add.Deft(s) Jefferson Hospital

Type of Case - Check (X) Only One Category

	010	Trespass: M.V.Accident		055	Mandamus / Quo Warranto
X	015	Trespass: Miscellaneous		070	Replevin
	016	Appeal from Municipal Court		080	Tax Cases
	020	Assumpsit		084	Malpractice - Medical
	025	Equity		085	Malpractice - Legal
	030	Eminent Domain		090	Appeal from Arbitration
	035	Ejectment		095	Assessment of Damages
	050	Libel and Slander		099	Other(Describe)

Consolidated Cases: Captions, Court Terms & Nos. (continue on reverse)

Date of Consolidation.
Order or Stipulation:

Estimated time for trial : Two days

I certify that at the time this case first appears on a published trial list: all discovery will be completed; there will be no outstanding pre-trial motions, discovery or otherwise; if an expert witness is being utilized, the necessary information as required by the Pa. R.C.P. has been furnished to all interested counsel; application will not be made for a continuance except for good cause arising after the case so appears and which good cause does not include any of the matters set forth herein; that this case will in all respects be ready when it is assigned for trial, and that a copy of this certificate has been served on all interested counsel in the case and, unless a higher amount is indicated, the amount at issue does not exceed $15,000.00.

#20953

Terry J. Siman — Sept. 18, 1980
Signature of Trial Counsel — Date

Counsel Who Will Actually Try the Case:	Telephone No.
For Pltff Terry J. Siman, Esquire	
For Deft Richard A. Kessler, Esquire for Gekoski & Bogdanoff	735-9690
For Add.Deft. M. Kelly Tillery, Esquire for Obermayer, Rebman Maxwell & Hippel	LO3-2511
	568-7911

DESIGNED BY THE BOARDROOM

RETURNED BY THE PROTHONOTARY
FOR THE FOLLOWING CORRECTION

- ☐ Fee Due
- ☐ Wrong Court
- ☐ Wrong Court, Term, or Number
- ☐ Incomplete Caption
- ☐ Not Signed
- ☐ Needs Signature of Attorney for Plt._____ Deft._____
- ☐ Form Not Complete
- ☐ Jury Trial Previously Demanded
- ☐ Needs Affidavit
- ☐ Refer to Rule _____
- ☐ Certification of Address Needed
- ☐ Order of Court Required
- ☐ Approval of Court Required
- ☐ Need Order to _____
- ☐ No Service
- ☐ Requires Docket Entries
- ☐ Need Name of Appellant and Number of Premises
- ☒ Other (Specify):

Preliminary objections filed 8-15-88

S-35

COMMONWEALTH OF PENNSYLVANIA:
SS
COUNTY OF PHILADLEPHIA :

I, Malcolm P. Rosenberg, Esquire, being duly sworn according to law, depose and say:

1. That during the spring of 1983 and spring of 1984, I telephoned the office of civil listings in Philadelphia, Pennsylvania to inquire as to the status of Wankoff vs. Tibbs et al. October Term, 1979, No. 5088.

2. That on these dates I was informed that the case had not yet been reached for trial listing and when it was reached it would be published in the Legal Intelligencer.

Respectfully submitted,

S.
MALCOLM P. ROSENBERG, ESQUIRE

Sworn to and subscribed
before me this 19th day
of October, 1988.

S.
Catherine Rose Catania
Notary Public

COMMONWEALTH OF PENNSYLVANIA:
SS
COUNTY OF PHILADLEPHIA :

I, Gilbert I. Yaros, Esquire, being duly sworn according to law, depose and say:

1. That during summer of 1985, fall of 1985 and winter of 1985, I telephoned the office of civil listings in Philadelphia, Pennsylvania to inquire as to the status of Wankoff vs. Tibbs et al. October Term, 1979, No. 5088.

2. That on these dates I was informed that the case had not yet been reached for trial listing.

3. In early June of 1986, I again telephoned the aforementioned office of civil listings to inquire as to the status of Wankoff vs. Tibbs et al.

4. On the aforementioned date, I was informed that the case would not appear on the trial list because they did not have a record of the Certificate of Readiness.

5. I immediately inquired as to the

procedure which would be necessary to file a Certificate of Readiness in light of the fact that the 240 Day Rule and local Rule 151 had been rescinded.

6. I was informed by the aforementioned office that all that would be necessary was a Petition to file a Certificate of Readiness nunc pro tunc, which was no more than a mere formality, and that such petitions were normally granted as a matter of course, particularly, in cases which had not yet reached the trial list.

7. Subsequently, thereafter, I immediately filed a petition to file a Certificate of Readiness nunc pro tunc.

Respectfully submitted,

S.
GILBERT I. YAROS, ESQUIRE

Sworn to and subscribed
before me this 19th day
of October, 1988.

S.
Catherine Rose Catania
Notary Public

Supreme Court, U.S.
FILED
DEC 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-736

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

EVELYN WANKOFF,
ADMINISTRATRIX OF THE ESTATE OF
IRVIN WANKOFF, DECEASED AND
EVELYN WANKOFF IN HER OWN RIGHT,
Petitioner

v.

THOMAS TIBBS AND CONSOLIDATED
FREIGHTWAYS CORPORATION
and
THOMAS JEFFERSON UNIVERSITY
HOSPITAL, ADDITIONAL DEFENDANT,
Respondents

BRIEF OF RESPONDENT THOMAS JEFFERSON UNIVERSITY HOSPITAL IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania, Eastern District

James M. Penny, Jr.*
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QUESTIONS PRESENTED

1. Whether the Supreme Court of the United States has jurisdiction to consider the federal question raised by petitioner since neither the decision below nor the record raises the federal question in the Petition.

2. Whether a state court has the inherent power to enter a judgment of non pros against a civil claimant where that claimant has failed to prosecute her case with due diligence.

3. Whether there exist special and important reasons for this Court to review a state court's exercise of its discretion in dismissing petitioner's negligence action for failure to prosecute with due diligence.

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On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania, Eastern District

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BRIEF FOR THOMAS JEFFERSON UNIVERSITY HOSPITAL IN OPPOSITION

Opinions Below

The Respondent Thomas Jefferson University Hospital respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Superior Court of Pennsylvania. By that opinion, the Superior Court of Pennsylvania affirmed the order of the Court of Common Pleas of Philadelphia County granting a judgment of non pros in favor of respondent and against petitioner. The opinion of the Superior Court can be found at pages A-5 to A-12 of petitioner's petition. The opinion of the Court of Common Pleas can be found at pages A-14 to A-17 of petitioner's petition. The Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied with no opinion issuing.

Jurisdiction

The Court has no jurisdiction to review the federal constitutional issues raised by petitioner since the federal questions involved were neither timely raised nor decided in the state courts of the Commonwealth of Pennsylvania. *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Statement of the Case

On October 31, 1979 petitioner and petitioner's decedent filed a Complaint in Trespass against Thomas Tibbs and Consolidated Freightways Corporation ("co-defendants"). In that Complaint, it was alleged that petitioner's decedent, Irvin Wankoff, was injured when he was struck by a truck driven by co-defendant Thomas Tibbs, and owned by co-defendant Consolidated Freightways Corporation as the truck was backing out of the

property of respondent Thomas Jefferson University Hospital. Respondent was not an original party. On February 25, 1980, the deposition of William Cox was taken. Mr. Cox was a security guard employed by respondent. Mr. Cox was an apparent eyewitness to this accident which occurred on June 12, 1978. Mr. Cox was allegedly involved in directing the truck as it was backing into the street.

On March 20, 1980, the depositions of two eyewitnesses, Lorna Shurkin and Jean Gray, were taken. These depositions, were attended by counsel for the petitioner and by counsel for co-defendants only. Co-defendants filed a Petition for Leave to Join respondent on March 15, 1980. The Complaint against respondent was filed on or about May 1, 1980.

The deposition of the petitioner's decedent was taken on July 21, 1980 and attended by counsel for all parties. The deposition of co-defendant Thomas Tibbs was taken on August 7, 1980 and attended by counsel for all parties. On August 15, 1980, respondent filed Preliminary Objections to Defendants' Complaint. Petitioner, on August 20, 1980, filed an application for extension of time to certify the action for trial. On or about October 1, 1980, it was ordered that the time to file a Certificate of Readiness was extended to December 31, 1980. Thereafter, on December 11, 1980, the Preliminary Objections of respondent were overruled. Respondent filed its Answer to co-defendant's Complaint and filed a Crossclaim against co-defendants on or about February 4, 1981. No Certificate of Readiness was ever filed by petitioner.

Petitioner's decedent, Irvin Wankoff, died due to causes unrelated to the accident on March 24, 1983. On February 7, 1986, petitioner filed, through her counsel, a suggestion of death substituting the personal representative of the estate of the original plaintiff. This was the first docketed action in this matter since July of 1981.

On June 20, 1986, five and one half years after the expiration of the court-granted extension period for filing a Certificate of Readiness, petitioner filed a Petition for Leave to File a Certificate of Readiness[1] nunc pro tunc. Respondent and co-defendants answered the Petition and moved for judgment of non pros. On August 20, 1986, the trial court entered an order denying the petition and ordered a judgment of non pros. The matter was appealed to the Superior Court of Pennsylvania. The questions presented in petitioner's brief to that court were as follows:

> I. Whether the court below abused its discretion in not granting the Appellant's Petition for Leave to Refile a Certificate of Readiness.
>
> II. Whether the court below abused its discretion in ordering a judgment of non pros.

The Superior Court found that petitioner demonstrated a want of due diligence, that oversight of counsel was not a sufficient excuse, and that the delay prejudiced the other parties to the case. (Pet.App. A-10, A-11). No federal question was addressed by the court.

Petitioner subsequently filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania never entertained petitioner's petition and ultimately denied the Application for Reconsideration on July 28, 1988.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record timely raises the federal question presented in the Petition.

The federal question raised in the Petition is whether the Commonwealth of Pennsylvania deprived

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1. Pursuant to local rule of Court, former Philadelphia Rule of Civil Procedure 151, petitioner was required to file a Certificate of Readiness on or before August 31, 1980.

the petitioner of a constitutionally protected interest to have "her day in Court on the merits". The only constitutional provision cited by petition in support of her argument is the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Since the decision below did not address this question and since this question has not been raised in a timely manner, the Court has no jurisdiction to consider the Petition.

It has long been mandated that the jurisdiction of the Supreme Court under 28 U.S.C.A. §1257 is not triggered unless a substantial federal question has been properly raised in the state court proceedings. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). *See, Crowell v. Randell,* 10 Pet 368, 9 L.Ed. 458 (1836).[2]

Further, raising the federal question for the first time in a petition for rehearing addressed to the highest state court in insufficient to confer jurisdiction unless the Court actually entertains the petition and expressly decides the question. *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 128 (1945).

The opinion of the Superior Court of Pennsylvania is devoid of any indication that petitioner ever properly raised a constitutional challenge to the entry of non pros. The Superior Court applied the established three-part test in Pennsylvania for dismissing cases for want of prosecution[3] and ruled that the lower court properly

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2. In *Crowell,* Justice Story discussed the earlier cases regarding the issue of the Court's jurisdiction under §25 of the Judiciary Act of 1789, the lineal ancestor of §1257, and concluded that the Court had no jurisdiction unless a federal question was raised and decided by the state court.

3. "A [trial] court properly enters a judgment of non pros when a party to the proceedings has shown a want of due diligence by failing to proceed with reasonable promptitude, when there has been no compelling reason for the delay, and when the delay has caused some prejudice to the adverse party". *Cathcart v. Keene Industrial Insulation,* 324 Pa.Super 123, 471 A.2d 493, 498 (1984).

exercised its discretion. No issue regarding the *constitutionality* of the action taken was addressed by the lower courts.[4] The Supreme Court of Pennsylvania never entertained the petition.

Moreover, the record is barren of any indication that the federal question was raised in a timely manner. Rule 302(a) of the Pennsylvania Rules of Appellate Procedure provides that "Issues not raised in the lower court are deemed waived and cannot be raised for the first time on appeal". This rule is applicable to issues of constitutional dimension. *Commonwealth v. Hawkins*, 295 Pa.Super, 429, 441 A.2d 1308 (1982). Failure to follow state appellate channels for the preservation of issues is fatal to Supreme Court review. *See, e.g., Beck v. Washington*, 369 U.S. 541, 553 (1962).[5]

Thus, petitioner has failed to raise in any manner below, the federal question she now presents. By so doing, petitioner has deprived the Commonwealth of Pennsylvania from determining this issue and, accordingly, has removed any basis for this Court's jurisdiction.

2. There exist no special or important reasons for the grant of certiorari since the lower court appropriately exercised its power and discretion in ordering a judgment of non pros.

a. The power of a court to dismiss a case with prejudice because of plaintiff's failure to prosecute has withstood constitutional scrutiny by this Court. In *Link*

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4. *Illinois v. Gates*, 463 U.S. 213, 221 (1982), this Court stated, "Likewise, 'due regard for the appropriate relationship of this Court to state courts' *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. at 434, 435, 60 S.Ct. at 673, demands that those courts be given an opportunity to consider the constitutionality of state officials, and, equally important, proposed changes in existing remedies for unconstitutional actions".

5. Petitioner, in *Beck*, failed to list the federal issue in his "assignment of errors" in his brief filed in the state supreme court or to argue the point in his brief.

v. Wabash Railroad Company, 370 U.S. 626, 630 (1962), it was recognized that a court's power to dismiss for lack of prosecution is an inherent power governed by the necessary control vested in Courts to manage their own affairs and achieve the orderly disposition of cases.[6] Even the absence of notice as to the possibility of dismissal or the failure to hold an adversarial hearing does not necessarily render the dismissal void. *Id.* at 632. "The adequacy of notice and hearing respecting proceedings that may affect a party's right turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have the consequences of his own conduct". *Id.* at 632.

It follows that any claim by the petitioner directed to the *power* of the courts of the Commonwealth of Pennsylvania to order a non pros is patently frivolous and not worthy of review. Petitioner inappropriately relied upon the case of *Logan v. Zimmerman Brush Company,* 455 U.S. 420 (1982). There exists a critical destruction between the *Logan* case and the instant matter. In *Logan,* the petitioner was deprived of an *opportunity* for a hearing by virtue of an administrative error although the petitioner had pursued his claims in a timely manner. Here, petitioner waited more than five years, while under an affirmative duty to certify the status of this case, before taking any step looking toward litigation. This inexcusable recalcitrance was appropriately recognized in the courts below.

b. The court below fully considered and decided the issues in a manner consistent with the existing law in Pennsylvania. Like the Supreme Court of the United States, the Supreme Court of Pennsylvania has long recognized that "[a]s a matter of fairness, one who

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6. *See also, Carnegie Mellon University v. Cahill,* ____ U.S. ____, 100 S.Ct. 614, 624 (1988) ("Courts have historically possessed an inherent power to dismiss suits for discretionary reasons such as failure to prosecute").

brings another into Court should prosecute the claim against him with reasonable diligence" *Hruska v. Gibson*, 316 Pa. 518, 521, 175 A.514 (1934). *See also, Potter Title & Trust Company v. Frank*, 298 Pa. 137, 141, 148 A.50 (1929).

The Supreme Court of Pennsylvania has addressed the circumstances under which this discretion may be properly exercised. The judgment of non pros is appropriate when a party to the proceedings: (1) has shown a want of due diligence in failing to proceed with reasonable promptitude; (2) there has been no compelling reason for the delay; and, (3) the delay has caused prejudice to the adverse party. *James Bros. Co. v. Union Banking Co.*, 432 Pa.129, 247 A.2d 587, 589 (1968); *Manson v. First Natl. Bank*, 366 Pa. 211, 215, 77 A.2d 399 (1951); *Hruska v. Gibson, supra*, 316 Pa. at 519. This test has been applied in numerous decisions of the Superior Court of Pennsylvania. *See, e.g., Cathcart v. Keene Industrial Insulation*, 324 Pa.Super. 123, 471 A.2d 493 (1984); *Carter v. Amick*, 246 Pa.Super. 530, 371 A.2d 961 (1977); *Kennedy v. Bulletin Co.*, 231 Pa.Super 66, 346 A.2d 343 (1975).

In reaching its decision below, that the Superior Court of Pennsylvania appropriately applied the above-stated principles. More than five years passed since there was any docketed activity and since there was any activity on petitioner's part looking toward litigation. Further, petitioner contended that the "compelling reason" for the lengthy delay was the "technical oversight" on the part of associate attorneys handling the case and the "extraordinary volume of work and other confusion created in counsel's office and throughout the entire legal community surrounding the relatively short lived 240 day rule". The court appropriately noted that the oversight and negligence of counsel is not an acceptable excuse and such an excuse failed to adequately address why five years passed before any action was taken in this litigation. Finally, the Superior Court appropriately

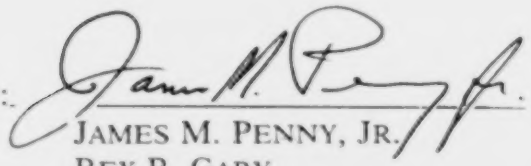
determined that defendants were prejudiced by the delay. The potential dimming of witnesses' memories is an appropriate consideration in assessing prejudice in this context. *See, Talbot v. Delaware County Trust Co.*, 384 Pa. 85, 119 A.2d 518, 519 (1956); *American Bank & Trust Company of Pennsylvania v. Ritter, Todd & Haayen*, 274 Pa.Super. 285, 418 A.2d 408, 410 (1980).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

OBERMAYER, REBMANN,
MAXWELL & HIPPEL

BY: 

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Hospital

Supreme Court, U.S.
FILED
DEC 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-736

IN THE
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OCTOBER TERM, 1988

EVELYN WANKOFF,
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Petitioner,

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FREIGHTWAYS CORPORATION AND
THOMAS JEFFERSON UNIVERSITY HOSPITAL,
ADDITIONAL DEFENDANT,

Respondents.

REPLY BRIEF OF PETITIONER IN OPPOSITION TO BRIEF OF RESPONDENT THOMAS JEFFERSON UNIVERSITY HOSPITAL IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, EASTERN DISTRICT

MALCOLM P. ROSENBERG, ESQUIRE
Malcolm P. Rosenberg & Associates
1201 Chestnut Street
13th Floor
Philadelphia, Pennsylvania 19107-4136
(215) 557-9690

QUESTION PRESENTED

1. Did the state courts avoid deciding upon the federal constitutional questions, which were timely and adequately raised by Petitioner, by putting forward nonfederal grounds of decision which were without any fair or substantial support, by rendering and affirming a judgment of non pros based upon misapplication of the law and repealed rules of the court; all of which was in the absence of a hearing?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA, EASTERN
DISTRICT

JURISDICTION

The Court has proper jurisdiction, under 28 U.S.C. section 1257 (2) and (3), to review the federal constitutional issues raised by Petitioner, because: 1) the federal questions involved were timely raised and adequately drawn into question by Petitioner in the state courts of the Commonwealth of Pennsylvania; 2) the nonfederal grounds for the decision by the Superior Court of Pennsylvania were without any fair or substantial support; and 3) state courts may not avoid deciding upon federal questions and thus defeat juridiction of the Court by putting forward nonfederal grounds of decision which are without any fair or substantial support. See Wolfe v. North Carolina, 364 U.S. 177, 185 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-458 (1958); and Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

STATEMENT OF THE CASE

Respondent, Thomas Jefferson University Hospital (hereinafter "University"), filed Preliminary Objections to a complaint (to join additional defendants), served on them by Respondents Thomas Tibbs (hereinafter "Tibbs") and Consolidated Freightways Corporation (hereinafter

"Consolidated"), on or about August 15, 1980. These Preliminary Objections were filed more than seventy days after the twenty day time limit for filing such Preliminary Objections, provided under Rule 1026(a), had elapsed.[1] These Preliminary objections by Respondent University, which were eventually overruled, accomplished nothing more than a delay in the discovery proceedings and confusion for the Prothonotary (Clerk of the court).

On or about August 18, 1980, and before Petitioner received notice of Respondent University's Preliminary Objections and after the Respondent University's right to file Preliminary Objections had expired, Petitioner's counsel timely filed a Certificate of Readiness with the Prothonotary in compliance with the "240 Day" Rule and Rule 151 (See Petitioner's Petition, pages 10-12).[2] Petitioner's counsel forwarded notice to all Respondents of the filing. Each Respondent, including the University, recieved a photostatic

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[1] The complaint (to join the additional defendant, University) was filed on May 1, 1980. Therefore, according to Rule 1026 (a), the University should have responded by May 21, 1980. Respondent did not, thereby flagrantly violating the Rules of Civil Procedure.

[2] Petitioner filed the Certificate of Readiness, which was nothing more than a "coat check," because all cousel knew that the case would be ready for trial years before it would ever appear on a published trial list. (See Petitioner's Petition, A-44).

copy of the same Certificate of Readiness shown on page A-44 of Petitioner's Petition.

All Respondents, upon receiving such notice, acted as if the Certificate of Readiness had been properly filed until or about June 1986, at which time they received Petitioner's Motion to File a Certificate of Readiness Nunc pro tunc. It was at this time, almost six years after Petitioner's Certificate of Readiness was erroneously returned by the Prothonotary, that Respondents first asserted a "prejudice" allegedly caused by the trial "delay," which prejudice is an essential, but waivable, element for a judgment. (See Petitioner's Petition, page 21).

After the Court of Common Pleas of Philadelphia County (hereinafter "lower court") rejected Petitioner's Motion for Reconsideration of its order for non pros, Petitioner immediately appealed to the Superior Court of Pennsylvania (hereinafter "Superior Court"). In its voluminous brief, Petitioner timely and adequately drew into question the federal constituional issues which it now raises before this Court. Along with these federal questions, which delt with the denial of Petitioner's "day in court" as guaranteed by the Fourteenth Amendment to the Constitution of the United States, Petitioner also raised several related but nonfederal questions.

The Superior Court made reference to neither the Petitioner's federal questions nor Petitioner's nonfederal questions. The Superior Court merely restated the lower court's opinion, which erroneously relied on the decision in Austin v. Southeastern Pennsylvania Transportation Authority, 450 A.2d 98, 304 Pa. Super. 56 (1982).[3] Petitioner again raised these same federal constitutional questions in both its Petition for Allowance of Appeal and its Motion for Reconsideration of Petitioner's Petition for Allowance of Appeal, both of which were rejected without opinion by the Pennsylvania Supreme Court. Therefore, Petitioner's present Petition for Writ of Certiorari stems from the opinion by the Superior Court of Pennsylvania, which was the highest state court which actively delt with the case at bar.

REASONS FOR GRANTING THE WRIT

I. THE STATE COURTS' NONFEDERAL BASIS FOR ITS DECISION WAS WITHOUT FAIR OR SUBSTANTIAL SUPPORT.

Petitioner three times asserted in her appellate brief to the Superior Court of Pennsylvania the federal constitutional questions

[3] One of Petitioner's nonfederal questions concerned the validity of the lower court's decision based on the Austin case.

she now presents to the Court. These specific federal constitutional questions were invoked by the Fourteenth Amendment to the Constitution of the United States, and were asserted, within the Petitioner's appellate brief, in the following manner.

Petitioner provided a detailed description of its timely filing of a Certificate of Readiness, and how its efforts were thwarted by Respondent University's untimely filing of Preliminary Objections compounded by the Prothonotary's erroneous return of the Certificate of Readiness to Petitioner. Petitioner then asserted that, had her Certificate of Readiness been properly accepted by the Prothonotary

> [she] would have [had] her day in court as guaranteed by the Constitution of the United States.

Immediately following this statement, Petitioner asserted the mistakes of fact of the lower court. These assertions placed into question the federal constitutionality of the lower court's decision, which was based on erroneous factual conclusions. These erroneous factual conclusions resulted from the lower court's failure and refusal to take testimony and/or to grant a hearing on the motion.

Petitioner further asserted that the Respondents' claims that they were prejudiced by

the trial "delay" were unfounded, because depositions were taken to secure the memories of all witnesses. Petitioner also noted that the trial waiting period was no longer than that which would normally be expected at that time of crowded court dockets and calendars. Immediately thereafter, Petitioner's brief described the lower court's misapplication of Austin in light of the fact that notice was neither given to Petitioner, nor was it alleged to have been given to Petitioner, as required under Philadelphia Star Rule *350. This portion of Petitioner's brief questioned the federal constituionality of the lower court's decision, which improperly relied on Austin.

The assertions by Petitioner, which are outlined above, were sufficient to draw the federal constitutional questions into the state court system. Therefore, Respondent University's contention that the record is "totally barren of any indication that the federal question was raised" was absolutely without support. Petitioner drew these federal matters into question in an accepted and timely fashion. See New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); and Williams v. Kaiser, 323 U.S. 471 (1944).

The fact that neither the Superior Court nor the Supreme Court of Pennsylvania (which prepared no opinion) made reference to these federal questions does not change the fact that these

questions were adequately presented by Petitioner within the state courts and that the state courts had the first opportunity to consider these federal questions. See Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

Federal questions should be decided upon by the state courts; however, there are clear exceptions to this general rule. Specifically, this Court has stated that

> [i]t is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of [the] Court by putting forward nonfederal grounds of decision which are **without any fair or substantial support.**

Wolfe v. North Carolina, 364 U.S. 177, 185 (1960). See also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-458 (1958). This exception protects the Petitioner by giving him or her an opportunity to appeal to the Supreme Court of the United States when a state court avoids a federal question by ruling upon insufficient nonfederal grounds. In the case at bar, the Superior Court of Pennsylvania skirted the issues raised by Petitioner in her appellate brief, and merely restated the opinion of the lower court, which itself was based on misapplied law and inapplicable case law.

Respondents conveniently rely on Cardinale, which notes that " . . . states are not free to avoid constitutional issues on inadequate state grounds." Cardinale at 439. The Supreme Court doctrine invoked by Wolfe, NAACP, and Cardinale, is tailor-made for the case at bar, because the state courts' decisions were based on an erroneous application of the laws of Pennsylvania and, hence, were without any fair or substantial support. Therefore, the nonfederal basis for the state courts' decisions does not preclude Petitioner from raising the federal issues she properly drew into question in the state courts. Moreover, this court has said that it is

> . . . well settled that if the independent [nonfederal] ground was not a substantial or sufficient one, "it will be **presumed** that the State court based its judgment on the law raising the Federal question, and this court will take jurisdiction."

Kaiser at 478.

Based on the Kaiser case, the Court may presume that the judgement of the Superior Court was based on federal constitutional grounds. The state courts' reliance on the Austin case was not adequate to support their judgments, because notice was not provided to Petitioner as required by Philadelphia Star Rule *350. (See Petitioner's Petition, pages 23-25). Such an absence of notice

(as admitted by all parties) constituted an unreasonable denial of due process.

There is no doubt that the Court has jurisdiction in this case.

II. THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO ADEQUATELY SUPPORT ITS JUDGMENT OF NON PROS AND BY FAILING TO RECOGNIZE RESPONDENTS' WAIVER OF THE RIGHT TO A NON PROS.

For reasons set forth in her Petition for Writ of Certiorari, Petitioner takes issue with the lower court's reliance on the Austin Case. The Superior court reversed the lower court in Taylor v. Oxford Land, Inc., 488 A.2d 59, 338 Pa. Super. 609 (1985), stating that specific notice must be given. Hence, the violation of this notice, in the case at bar, was apparent per se, since all parties agree that notice was never given as specified by Philadelphia Star Rule *350.

However, the Superior Court panel, upon which Judge DelSole was a panel member (See Petitioner's Petition, A-5), failed to recognize this overt defect in the lower court's decision, despite the assertions of such in the Petitioner's brief. Oddly, it was Judge DelSole, sitting as hearing jurist, who was overturned by the Superior Court when he made a similar mistake in the Taylor case.

Notice was absent and so too was due process.

Furthermore, Respondents waiver of the right to a non pros was clear. If it can be said that Petitioner in the case at bar took no action on the case during the interim period between completion of discovery and the Petitioner's filing of a Suggestion of Death, it can just as easily be said that Respondents also took no action during that time. In fact, all parties and counsel awaited the call for trial which all knew was years in the future. Non pros against a plaintiff is usually invoked by action on the part of the defendent to which the plaintiff fails to respond. Defendants' (and plaintiff's) only action was to complete discovery, hold settlement conversations and await the trial date. The doctrine of waiver of a non pros is well established in Pennsylvania. Poluka v. Cole, 295 A.2d 132, 222 Pa. Super. 500 (1972); DeSiato v. Shahboz, 419 A.2d 798, ___ Pa. Super. ___(1980).

The lower court in the case at bar abused its discretion by denying due process of law to Petitioner (See Petitioner's Petition). Respondent University's Brief in Opposition of Petitioner's Petition contains erroneous and mistaken facts. This could have been remedied by a hearing-- the taking of sworn testimony-- sworn affidavits to support and/or justify a finding. But the record is barren of such due process proceedings. Who now will right a wrong? Or, will one injustice beget another?

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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